HARVARD

LAW REVIEW.

VOL. XV. MARCH, 1902. NO. 7

GIFTS FOR A NON-CHARITABLE PURPOSE.

A DEVISE or bequest for a charitable purpose is valid although there be no definite *cestui que trust.* The State, through the attorney-general, will compel the trustee, or, if need be, will appoint a trustee, to carry out the purpose.

Charities offer an exception to the general rule that every trust without a definite *cestui que trust* is void. When there has been an attempt to create such a trust by will, and it is clear that the trustee was not intended to hold beneficially, there is a resulting trust for the heir, next of kin, residuary devisee, or residuary legatee of the testator, as the case may be. The court cannot carry out or protect the trust which the testator has tried to create, and so it gives the property to the person representing the testator, leaving it to him to carry out the purpose if he sees fit.[1]

In the leading case of Morice *v.* Bishop of Durham, Sir William Grant puts the doctrine thus : —

[1] Morice *v.* Bishop of Durham, 9 Ves. 399, 10 Ves. 521; James *v.* Allen, 3 Mer. 17; Ommanney *v.* Butcher, T. & R. 260; Vezey *v.* Jamson, 1 S. & St. 69; Fowler *v.* Garlike, 1 Russ. & M. 232; Williams *v.* Kershaw, 5 Cl. & F. 111, *n.*; Ellis *v.* Selby, 1 Myl. & Cr. 286; Stubbs *v.* Sargon, 2 Keen 255, 3 Myl. & Cr. 507; Harris *v.* Du Pasquier, 26 L. T. R. 689; Buckle *v.* Bristow, 10 Jur. N. S. 1095; Leavers *v.* Clayton, 8 Ch. D. 584; *In re* Nottage, [1895] 2 Ch. 649; Chamberlain *v.* Stearns, 111 Mass. 267; Nichols *v.* Allen, 130 Mass. 211; Adye *v.* Smith, 44 Conn. 60; Holland *v.* Alcock, 108 N. Y. 312; Taylor *v.* Keep, 2 Brad. 368; Stewart *v.* Green, Ir. R. 5 Eq. 470; Browne *v.* King, 17 L. R. Ir. 448; *In re* Cullimore's Trusts, 27 L. R. Ir. 18. See McHugh *v.* McCole, 97 Wis. 166.

"There can be no trust, over the exercise of which this court will not assume a control; for an uncontrollable power of disposition would be ownership and not trust. If there be a clear trust, but for uncertain objects, the property that is the subject of the trust is undisposed of; and the benefit of such trust must result to those to whom the law gives the ownership in default of disposition by the former owner. But this doctrine does not hold good with regard to trusts for charity. Every other trust must have a definite object. There must be somebody in whose favor the court can decree performance." [1]

Professor Ames has an interesting article on "The Failure of the 'Tilden Trust.'" [2] With his comments on the objectionable character of the New York statutes touching charities (now happily repealed),[3] I agree; but he goes on to disapprove of the doctrine of Morice *v.* Bishop of Durham. He admits that that case "has never been directly impeached, either in England or this country," but he contends that it is unsound in theory, and that, in contradiction to it, "there are several groups of cases, undistinguishable from it in principle." His view is that although a trustee cannot be compelled to carry out a trust for an indefinite non-charitable object, and although, if he refuse to carry it out, there will be a resulting trust, yet, if he be willing to carry it out, the court should not interfere, at the instance of the testator's heir or next of kin, to prevent him.

"Where the will of the testator," he says, "can be fulfilled, equity [according to the doctrine of Morice *v.* Bishop of Durham], by interfering, defeats his will and thus produces the unjust enrichment of the testator's representative at the expense of the intended beneficiary." [4]

The doctrine in question undoubtedly produces the enrichment of the testator's representative; but is such enrichment unjust?

Let us, in the first place, look at the matter *inter vivos*. Suppose A. transfers certain property to B., and directs that B. shall employ it for such lawful purposes, not beneficial to B., as B. may see fit, there being no element of contract in the case.[5] If B. goes on and delivers the property, the persons who receive it get, undoubtedly, a good title; but suppose, before B. thus deals with the property, A. demands it back. Will the court require B. to return it; or can B. refuse, saying, "I am going to spend it as you directed,

---

[1] 9 Ves. 399, 404, 405.

[2] 5 HARV. L. REV. 389.

[3] By the N. Y. St. of 1893, c. 701, as ruled by the Court of Appeals, Allen *v.* Stevens, 161 N. Y. 122.

[4] 5 HARV. L. REV. 395.

[5] See Gilman *v.* McArdle, 99 N. Y. 451.

for lawful purposes not beneficial to myself"? Now, although it may be difficult to find many reported cases where such a question has arisen, there is a class of decisions directly in point. When a man assigns property to trustees to pay his debts, it is held in England that the creditors acquire no rights, until they consent to the assignment, and that, *therefore*, the assignment is revocable by the debtor.[1]

It is true that these cases have not been generally followed in the United States, but this is because it is held in this country that the creditors become *cestuis que trust* upon the execution of the deed, and have immediately vested rights.[2] The test always propounded in these cases is whether the conveyance has been made for the benefit of the settlor, so as to save him from the trouble or care or thought of doing things for himself, in which case it is revocable; or whether it has been made because he wishes to give third persons rights, in which case it is irrevocable.[3] Now, when a so-called trust has been created without any *cestuis que trust*, the purpose of its creation is almost necessarily the former; and, therefore, I believe that it can be revoked by the settlor. I know of no authority to the contrary. At any rate, such a doctrine has nothing unjust or inequitable about it.

The strongest argument against this view is drawn from analogy of powers. Mr. Ames puts it forcibly: —

"It may be objected that a devise might in this way become 'the mere equivalent of a general power of attorney'; but this objection seems purely rhetorical. Suppose a testator to give A. a purely optional power of appointment in favor of any person in the world except himself, with a provision that in default of the exercise of the power the property shall go to the testator's representatives, — or this provision may be omitted altogether, the effect being the same. Such a will is obviously nothing if not the mere equivalent of a general power of attorney. And yet the

---

[1] See, for instance, Walwyn *v.* Coutts, 3 Mer. 707, s. c. 3 Sim. 14; Garrard *v.* Lauderdale, 3 Sim. 1; 2 R. & M. 451; Acton *v.* Woodgate, 2 M. & K. 492; Smith *v.* Keating, 6 C. B. 136; Cornthwaite *v.* Frith, 4 DeG. & Sm. 552; Johns *v.* James, 8 Ch. Div. 744; *In re* Sanders' Trusts, 47 L. J. Ch. 667; *In re* Ashby, [1892] 1 Q. B. D. 872; Lewin, Trusts (10th ed.), c. 20, sec. 2. The right to revoke such a trust can be exercised after the death of the settlor. Garrard *v.* Lauderdale, *Re* Sanders' Trusts.

[2] The cases will be found collected in Burrill on Assignments (6th ed.), §§ 257, 258.

[3] Wilding *v.* Richards, 1 Coll. 655; Mackinnon *v.* Stewart, 20 L. J. Ch. 49, 53; Smith *v.* Hurst, 10 Ha. 30, 47; Johns *v.* James, 8 Ch. Div. 744, 749, 750; *In re* Ashby, [1892] 1 Q. B. 872, 877, 878; New's Trustee *v.* Hunting, [1897] 1 Q. B. 607, 615, 616.

validity of this power would be unquestioned. If the power is exercised, the appointee takes. If it is not exercised, the testator's representative takes.

"Now vary the case by supposing that the testator imposes upon the donee of the power the *duty* to exercise it. Can the imposition of this duty furnish any reason for a different result? In fact, A., the donee of the power, has in this case also the option of appointing or not, since although he ought to appoint, no one can compel him to do so. Does it not seem a mockery of legal reasoning to say that the court will sanction the exercise of the power where the donee was under no moral obligation to act at all, but will not sanction the appointment where the donee was in honor bound to make it?" [1]

Most cases of powers can be readily distinguished, but let us take a case *inter vivos* similar to that suggested by Mr. Ames.

Land is conveyed to B. in trust for A. for life, on A.'s death as B. shall appoint, — save that he must not appoint to or for himself, — and, in default of appointment, the land to revert to the settlor. Here, as Mr. Ames says, we have an irrevocable power in B., and, without doubt, nothing the settlor can do will prevent B.'s making a valid appointment.

Suppose, however, land is settled on A. for life, and then on B. in trust for such persons, other than himself, as he may select. Mr. Ames says there ought to be no difference between this case and the former one, and that though the settlor attempts to revoke B.'s authority, yet B. can go on and make a selection which will be valid.

But, with submission, this is the distinction: The common law allows property to pass from one person to another on any future contingency (provided it is not too remote) and the contingency may be a nomination by a third person. But the common law will not allow a right *in personam*, an obligation, to be created without two parties. It will not recognize a promisor without a promisee, a contractor without a contractee, or a trustee without a *cestui que trust*.

To this, I take it, Mr. Ames would answer: "Granting that there cannot be a trustee without a *cestui que trust*, and that the settlor has attempted to impose a duty upon B. which cannot be enforced, yet that will not prevent B. from being the donee of an irrevocable power."

But is not the reply this?

It is a matter of intention. Is B. a mandatary of the settlor?

[1] 5 HARV. L. REV. 395, 396.

That is, is he an agent of the settlor to act for him and on his behalf? Or is it contemplated that he shall have an independent authority, with power to act against the settlor's wishes and interests? If he is the former, then his mandate is revocable. The law does not allow of irrevocable mandates.[1] If he is the latter, then his power is irrevocable.

Now, in the first case supposed above, the case of the power, it is clear that B. is to have an entirely independent authority. The settlor has said how the property shall go, but B. has the right, at his mere will or whim, against every wish or interest of the settlor, to change the direction. This is said plainly on the face of the settlement. There is a definite *cestui que trust* with a power in B. to substitute another *cestui que trust.*

In the second of the supposed cases, the case of the trust, the use of the word "trust," the absence of any gift over, the absence of any named person who is to take or who may be deprived of the property, show an intention on the part of the settlor to employ B. as his agent to dispose of the property, and we have here an instance of a mandate. I do not say that this construction of the transaction is required as a logical necessity: but I do say that it is a perfectly reasonable, equitable, and fair construction.

Let us now pass to cases arising after death. Suppose such a trust as we have been considering, where there is no *cestui que trust*, has been created by settlement, and that the settlor dies. Does the right of revocation survive to the heir or executor? What rights shall survive and what not is matter of rather arbitrary law, but considering the current of legislation and decision, it is safe to say that the present policy of the law is that all rights which concern only property shall survive. Certainly there is nothing inequitable or unjust in such a policy. As noted above, when property has been given to a person in trust to pay creditors, the trust can be revoked after the death of the creator of the trust.[2]

But the case which ordinarily occurs in practice arises when the trust is created by will. Here there is no question of the survival of an interest which existed before the death of the testator. The trust or mandate and the power of revocation, if it exists, both come into being on the death of the testator. But, both in the settlement and in the will, there is the same attempt to create a

[1] Blackstone *v.* Buttermore, 53 Pa. 266; Walker *v.* Denison, 86 Ill. 142; Chambers *v.* Seay, 73 Ala. 372.

[2] Garrard *v.* Lauderdale, 3 Sim. 1; s. c. 2 R. & M. 451; *Re* Sanders' Trusts, 47 L. J. Ch. 667.

legal duty without a legal right, which the law does not allow. It is not the case of the donee of a power where the testator has named a devisee and given a third person the power to substitute another devisee at his own option ; but it is the case of a mandate to carry out the wishes of a testator and to act for him instead of his acting for himself. Whether the power of revoking this mandate, as it would exist in the settlor upon a transaction *inter vivos*, shall exist in the heir or personal representative of the testator, or, in other words, whether a mandate created by will shall be irrevocable, though a mandate created by deed is not, is a matter which might conceivably be decided either way. But the analogy of the law is that any arrangement which gives the settlor certain rights, when it is made *inter vivos*, will, when it is made by will, give the same rights to the heir or personal representative of the testator. Thus, if land is devised on a condition subsequent, the heir has the right of entry.

The law will not allow a man in his lifetime to create a situation where the legal title is in A. and the beneficial interest is in no one. If such transaction is regarded as a trust, it is void ; if it is regarded as a mandate, it is revocable. It is not unjust or against public policy for the law to deny a man the power to create a situation after his death which it denies him the power to create during his life.

It may be said that there is a distinction between the creation of a trust with indefinite *cestuis* by will and its creation by deed, in this : When such a trust is created *inter vivos*, no one, except the settlor, has any reason to count on its being carried out, and therefore no one except the settlor has any rights under it ; even those who disapprove of the doctrine of Morice *v.* Bishop of Durham cannot say that its application to settlements is in any way *unjust;* but the testator does expect that the trust created by his will is to be carried out, and to allow this expectation to be defeated by the action of the heir or next of kin, when the trustee is prepared to carry it out, is unjust. There is nothing unjust in allowing a man to defeat his own schemes, but it is unjust to allow one man's schemes to be defeated by another.

But this, it is submitted, overlooks the fact that there is no injustice in the law restraining, by general rules, the power of a man to say what shall be done with his property after his death. The law does allow a man on his death to transfer to others the rights which he himself has had, but it says that the mandates and agencies which he has given shall cease and that he shall

not create new ones. Agents without a principal, agents whose principal is a dead man, it will not allow, and in this there seems nothing unjust.

I repeat that I am not claiming that the doctrine of Morice *v.* Bishop of Durham is a legal necessity; but I submit that it is reasonable, equitable, and in accordance with the analogies of the law; and that there is good reason why, as Mr. Ames says, Morice *v.* Bishop of Durham "has never been directly impeached, either in England or in this country."

To the doctrine of Morice *v.* Bishop of Durham, there are some real and some supposed exceptions.

I. *Charities.* Gifts in trust for charitable uses are valid, although no definite *cestui que trust* be named. This is an exception in form only. The State, through the attorney-general, enforces these trusts.

II. *Funeral Expenses.* From the necessity of the case, an executor or administrator can pay the funeral expenses of the deceased; and although no one can compel him to carry out the directions of the will as to the testator's burial, yet, if he does carry them out, the courts will protect him from claims on the part of heirs, next of kin, or residuary legatees.

III. *Monuments. A. Erection.* A monument to the deceased or over his grave is esteemed part of his funeral expenses. "It stands on the same footing as an expensive funeral,"[1] and (if the rights of creditors are not interfered with) an executor will be allowed to follow the directions of his testator,[2] although they be of the most extravagant character. In Detwiller *v.* Hartman,[3] the testator directed his executor "to purchase a burial plot of ground 100 feet square in the Easton cemetery, and cause to be erected thereon a granite monument, the cost not to exceed $50,000 nor less than $40,000."[4]

But in a few cases the rule has been extended so as to allow the erection of monuments to persons other than the deceased. When an executor is directed to place monuments on a family burial ground where the testator directs or expects that he will himself be buried, the cost of such erections may come under a liberal interpretation of funeral expenses. Such was the case in

---

[1] Mellick *v.* Asylum, Jac. 180, 184.

[2] See Trimmer *v.* Danby, 25 L. J. Ch. 424, 427.

[3] 37 N. J. Eq. 347.

[4] *Cf.* Emans *v.* Hickman, 12 Hun 425; Bainbridge's Appeal, 97 Pa. 482.

Mitford *v.* Reynolds ;[1] Wood *v.* Vandenburgh ;[2] Fite *v.* Beasley ;[3] Cannon *v.* Apperson ;[4] Ford *v.* Ford.[5]

In Gilmer *v.* Gilmer,[6] a bequest for the erection of monuments to the memory of "Gen. Stonewall Jackson" and Colonels Cobb and Bartow was held valid; but these monuments were not funerary, and the ground for supporting the bequest must be that the erection of a monument to a distinguished public man is a charitable use.[7]

There are no cases in the United States where trusts for monuments to private persons, such monuments having no connection with the interment of the testator, have been allowed. There are two such cases in England. The first is Masters *v.* Masters.[8] A testatrix left £200 for a monument to her mother. The validity of the legacy was not questioned. The only point discussed was whether it should abate proportionately with the other legacies, some of which were for charities. "It was objected that the £200, given for a monument for the mother, ought not to abate in proportion, this being a debt of piety to the memory of her mother, from whom the testatrix received the greatest part of her estate. And to this the court (Sir Joseph Jekyll, M. R.) inclined, but however reserved that point." So reads the report; but according to Mr. Cox's note *in loco*, the decree declares that the "legatees and charities (except the £200 for the monument) are to abate in proportion." But as we shall see in the next paragraph, at the time of this case, and for many years after, even trusts for the repair of monuments were held to be charitable, and the assumption in Masters *v.* Masters that the legacy was valid is in line with that doctrine and was to be expected.[9] The other case is Musset *v.* Bingle.[10] A testator directed his executors to apply £300 in erecting a monument to his wife's first husband, and also to invest £200, and apply the interest in keeping up the monument. It was admitted that the latter direction was bad; the question argued was whether the former direction was good. Hawkins, V. C., said "that the direction to the executors was a perfectly good one, and one which they were ready to perform, and

[1] 16 Sim. 105; 1 Ph. 185, 706. [2] 6 Paige 277. [3] 12 Lea 328.
[4] 14 Lea 553, 590. [5] 91 Ky. 572. [6] 42 Ala. 9.
[7] *Cf.* Smith's Estate, 5 Pa. Dist. Ct. 327; but see *Re* Jones, 79 L. T. R. 154.
[8] 1 P. Wms. 421 (1718).
[9] *Cf.* "Concerning the building or erecting of tombs, sepulchers, or monuments for the deceased . . . is the last work of charity that can be done for the deceased." 3 Inst. 202.
[10] Reported only W. N. (1876) 170.

it must be performed accordingly." This meagrely reported case seems to be the only authority at the present day for sustaining a trust for a monument in a case where the trust cannot be supported, either as a charity or as coming within funeral expenses.

B. Repairs. Trusts for the perpetual repair of tombs and monuments were originally held to be charitable; bad, if they contravened the Mortmain Act; but otherwise, good.[1] In 1815 Lord Ellenborough in Doe d. Thompson *v.* Pitcher[2] took a distinction between a monument to the testator himself and a monument to a third person. He said, with reference "to a trust (by deed) for keeping up a tomb. It does appear, I think, to be a charitable use in part and in part not. As far as concerns the grantor's own interment it is not, but inasmuch as it is for her family, it may be so considered."[3] This distinction was adopted by Mr. Jarman in his Treatise on Wills, and was continued by him down to the third edition (1861).[4] In Jones *v.* Mitchell,[5] a legacy of £60 to repair a family tomb passed without question; and in Baker *v.* Sutton,[6] trusts to repair tombs were held within the Mortmain Act. But in Lloyd *v.* Lloyd,[7] it was held that a trust to repair a tomb, although not within the Mortmain Act, was invalid, and this decision has been constantly and uniformly followed in England.[8] The later English doctrine has been followed or approved in most of the American cases.[9] The older doctrine that a trust to repair a tomb was valid seems to have been adopted with-

---

[1] Durour *v.* Motteux, 1 Ves. Sen. 320 (1749). See Gravenor *v.* Hallum, Amb. 643 (1767) (*cf.* notes 4 and 7 to Blunt's edition of Ambler; and Boyle on Charities 46); Blackshaw *v.* Rogers, cited in 4 B. C. C. 349; Boyle, 47 (1779).

[2] 3 M. & S. 407.

[3] But *cf.* s. c. on a second ejectment, 6 Taunt. 359, 370; 2 Marsh. 61, 71; Boyle 48; Tyssen, Char. Bequests, 78.

[4] Jarman, 3d ed. 194.

[5] 1 S. & St. 290 (1823).

[6] 1 Keen 224 (1836).

[7] 2 Sim. N. S. 255 (1852).

[8] Rickard *v.* Robson, 31 Beav. 244; Fowler *v.* Fowler, 33 Beav. 616; *In re* Rigley's Trusts, 36 L. J. Ch. 147; Hoar *v.* Osborne, L. R. 1 Eq. 585; Fisk *v.* Atty.-Gen., 4 Eq. 521; Hunter *v.* Bullock, 14 Eq. 45; Dawson *v.* Small, L. R. 18 Eq. 114; *In re* Williams, L. R. 5 Ch. D. 735; *In re* Birkett, 9 Ch. D. 576; *In re* Vaughan, 33 Ch. D. 187. See *In re* Tyler, [1891] 3 Ch. 252; *Re* Jones, 79 L. T. R. 154; Tyssen, c. 7. *Contra, semble, In re* Sinclair's Trust, 13 L. R. Ir. 150.

[9] Piper *v.* Moulton, 72 Me. 155, 161, overruling *qu.* Swasey *v.* Am. Bible Soc.; Bates *v.* Bates, 134 Mass. 110; Coit *v.* Comstock, 51 Conn. 352; Kelly *v.* Nichols, 17 R. I. 306; Matter of Fisher, 2 Connoly 75; Trustees of M. E. Church of Wells *v.* Gifford, 5 Pa. C. C. 92; Johnson *v.* Holifield, 79 Ala. 423. See Knox *v.* Knox, 9 W. Va. 124.

out discussion in Gafney *v.* Kenison.[1] Legislation authorizing the establishment of such trusts is common in the United States.[2]

IV. *Masses.* In England a devise or bequest for the saying of masses for the soul of the testator or of others is illegal, as for a superstitious use, and so no question as to its coming within the doctrine of Morice *v.* Bishop of Durham arises.[3] Generally, in America such devises or bequests are good charitable trusts, and for that reason Morice *v.* Bishop of Durham has no application.[4] In New York such gifts, though considered charitable, were, under the provisions of the Revised Statutes (now happily repealed), held bad for want of a specific legatee.[5] In Festorazzi *v.* St. Joseph's Catholic Church,[6] such a bequest was held not charitable, and therefore void. This was in accordance with Morice *v.* Bishop of Durham.

The Irish cases call for special attention. In Commissioners *v.* Walsh,[7] a bequest for the saying of masses for the testator's soul was held good. The decree included the bequest as among "charitable uses and purposes." This case was followed in Read *v.* Hodgens.[8] In Brennan *v.* Brennan,[9] such bequests were spoken of as "charitable bequests." There was no discussion. In Bradshaw *v.* Jackman,[10] Porter, M. R., held "that a bequest for masses was not in itself illegal."

In Atty.-Gen. *v.* Delaney,[11] it was decided that such a bequest was not "for any purpose *merely* charitable" within the exception of a statute [12] imposing a legacy duty. Pallas, C. B., in delivering his opinion, said,[13] in reply to the contention that such bequests must be "deemed charitable": "In my opinion, this is not the real question which we have to decide. We are bound down within much more narrow limits. Our province is confined to determin-

---

[1] 64 N. H. 354.

[2] Jones *v.* Habersham, 3 Woods 443, 470; S. C. 107 U. S. 174, 183, 184; Bronson *v.* Strouse, 57 Conn. 147; Smith's Estate, 5 Pa. Dist. 327. (As to Hornberger *v.* Hornberger, 12 Heisk. 635, see p. 529, *post.*)

[3] See cases collected in Tyssen, c. 5; and also *In re* Fleetwood, 15 Ch. D. 594, 609; and Elliott *v.* Elliott, 35 Sol. J. 206.

[4] Schouler, Petitioner, 134 Mass. 426; Seibert's Appeal, 18 W. N. C. (Pa.) 276. See Rhymer's Appeal, 93 Pa. 142; Seda *v.* Huble, 75 Iowa 429; Elmsley *v.* Madden, 18 Grant (U. C.) 386.

[5] Holland *v.* Alcock, 108 N. Y. 312. See Gilman *v.* McArdle, 99 N. Y. 451; Vanderveer *v.* McKane, 25 Abb. N. C. 105; Estate of Howard, 5 N. Y. Misc. 295; Matter of Backes, 9 N. Y. Misc. 504.

[6] 104 Ala. 327. [7] 7 Ir. Eq. 34, n. (1823). [8] Id. 17 (1844).

[9] Ir. R. 2 Eq. 321 (1868). [10] 21 L. R. Ir. 12 (1887). [11] Ir. R. 10 C. L. 104.

[12] 5 & 6 Vict. c. 82, sec. 38. [13] Ir. Rep. 10 C. L. 122.

ing whether the purpose in question is one merely charitable within the" said statute. And this decision was followed in Perry *v.* Tuomey.[1] In Dillon *v.* Reilly[2] the provision for the offering of masses was in the form of a condition upon a gift to individuals.

There is, however, a series of cases before Sullivan, M. R., and Chatterton, V. C., given in the note[3] in which bequests for masses have been held void. In the first of these cases (Boyle *v.* Boyle), the decision was placed squarely on the doctrine of Morice *v.* Bishop of Durham. But in the later cases the gifts were declared void because creating a perpetuity; and taking the word "perpetuity" in its primary sense of "inalienable interest," the reason was not incorrect, the gifts were bad because the property could not be alienated, and it could not be alienated because there was no one to alienate it.

After these cases came Reichenbach *v.* Quin.[4] Here the testatrix requested her trustees "to apply £100 towards having masses offered up in public in Ireland," for the repose of her soul and the souls of certain other persons. Chatterton, V. C., after stating the terms of the bequest, said: "I do not consider that there is any attempt here to create a perpetuity, and on that ground — and I wish it to be understood that on that point only I give a decision — I shall declare that the gift is valid."

The course of events was that Chatterton, V. C., at first, in Boyle *v.* Boyle, placed his decision on the true ground, the want of a definite *cestui que trust,* but afterwards gave (followed in this by Sullivan, M. R.,) as the ground of the decisions what was only an incident of the true ground, viz., inalienability, and then, when he thought that incident failed, he, without due care, assumed that all ground had failed for condemning the trust. The opinion was evidently not carefully considered. Reichenbach *v.* Quin is the only one of the cases on masses which contradicts Morice *v.* Bishop of Durham.

In Small *v.* Torley,[5] an annuity was given to a clergyman and his successors for 50 years upon a trust for the celebration of masses. The court held "that as an attempt to create a perpetuity it is void." And in Brannigan *v.* Murphy,[6] a bequest in trust to say masses was declared void as a perpetuity.

---

[1] 21 L. R. Ir. 480 (1888). [2] L. R. Ir. 10 Eq. 152.

[3] Boyle *v.* Boyle, Ir. R. 11 Eq. 433 (1877); Beresford *v.* Jervis, 11 Ir. L. T. R. 128 (1877); Kehoe *v.* Wilson, 7 L. R. Ir. 10 (1880); Morrow *v.* M'Conville, 11 L. R. Ir. 236 (1883); Dorrian *v.* Gilmore, 15 L. R. Ir. 69 (1885).

[4] 21 L. R. Ir. 138 (1888). [5] 25 L. R. Ir. 388 (1890). [6] [1896] 1 Ir. 418.

There is a case mentioned by Mr. Ames as being in conflict with the doctrine of Morice *v.* Bishop of Durham, which may be mentioned as well here as anywhere. In Gott *v.* Nairne,[1] the testator, by a codicil to his will, gave £12,000 to trustees upon trust, as soon as conveniently might be, but nevertheless at the absolute discretion of the trustees, to invest the whole or part in an advowson, and until his son John should be presented to a benefice of £1000 a year, or should die, to present a fit person to the benefice, and subject thereto the trustees should hold the advowson in trust for John. Until such investment in an advowson, the £12,000 to be invested in certain securities, the income to be accumulated for 21 years, and (in case the advowson had not been purchased) after the 21 years to pay the income to the son or his executors or administrators, and if the son died or was presented to a benefice of £1000 a year, before the advowson was purchased, the £12,000 and the accumulations were to belong to John.

The £12,000 had been set aside and invested in securities, but the advowson had not been purchased. John brought a bill in equity praying that the fund should be transferred to him, whether he had or had not been presented to a benefice of £1000. The trustees demurred. The demurrer was sustained. That is, the court (Hall, V. C.,) held that the money was payable under the terms of the trust to the son John, upon certain conditions which had not been fulfilled. The plaintiff was claiming under the trust, there was no claim against the trust, and no question as to its validity. John, from his going into the Church, and from his being provided for in a codicil, seems to have been a younger son only.

V. *Animals.* In Mitford *v.* Reynolds,[2] a testator gave "the remainder" of his property, "after deducting the annual amount that will be requisite to defray the keep of my horses (which I will and direct to be preserved as pensioners, and are never, under any plea or pretence, to be used, rode or driven, or applied to labor)" for a certain object. The case was elaborately discussed on two points, — first, what was included in "the remainder" of the property, and, secondly, whether the object to which the remainder was given was a good charity. It was held that it was a good charity. No discussion whatever seems to have taken place on the validity of the direction as to the horses, but the report states that the order "made provision for the maintenance of the testator's horses; and on the death of them or either of them" there

[1] 3 Ch. D. 278.

[2] 16 Sim. 105.

was to be liberty to apply.[1] In the later case, *In re* Dean, to be immediately referred to, North, J., speaking in his opinion of Mitford *v.* Reynolds, makes the following statement: —

"The order made on further consideration in that case has been produced from the Record Office during the hearing of the present case, and it contains a declaration that the provisions for the horses was good. It is clear there must have been evidence before the Court showing that at that time two only of the testator's horses (he had died eleven years before) were living. Then provision was made for carrying over the sum of £1800 Consols to the fund for the maintenance of the horses, and directions were given for the application of the income, with liberty to apply, as to the whole or part of the fund, when the horses or either of them should have died."[2]

But the important case is *In re* Dean.[3] A testator bequeathed his horses and dogs to his trustees, and charged his land with the payment to his trustees during 50 years, if any of the horses and dogs should so long live, of the sum of £750 annually. He declared that the trustees should apply said sum to the maintenance of said horses and dogs, and of their stables and kennels. He further declared that the trustees "shall not be bound to render any account of the application or expenditure of the said sum of £750, and any part thereof remaining unapplied shall be dealt with by them at their sole discretion;" that the horses should not be worked, but might be exercised; and that neither the horses nor dogs should be sold. He also gave to the trustees for 50 years, if any of the horses or dogs lived so long, the stables and kennels inhabited by them.

The residuary legatee brought a proceeding in equity to obtain a declaration that the gift of £750 a year to the trustees was invalid, or, in the alternative, that the plaintiff was entitled to the balance of the £750 after making provision for the horses and dogs. North, J., in an elaborate opinion, held that the provision for the horses and dogs was not void. The grounds on which he went were the decisions in which bequests for building monuments had been sustained and the case of Mitford *v.* Reynolds, on which he commented at great length, and in which, he contended, the validity of the provision for the horses must have been considered by the court. The learned judge also held that any surplus of the £750 not required for the maintenance of the horses and dogs was not taken by the trustees beneficially, but went either to the de-

[1] 16 Sim. 120. [2] 41 Ch. D. 559, 560. [3] 41 Ch. D. 552 (1889).

visee of the land or to the heir; in the absence of the latter, he did not decide to which.

Morice *v.* Bishop of Durham was not referred to by the learned judge, nor does the inconsistency between the doctrine of that case and his own decision seem to have been present to his mind.

The correctness of Mr. Ames's statement that *In re* Dean is irreconcilable with the decisions of Sir William Grant and Lord Eldon seems to be indisputable. It is really the one important decision in conflict with Morice *v.* Bishop of Durham. We must choose between them, and it is submitted that it is not *In re* Dean that should be followed.[1]

VI. *Slaves.* Mr. Ames refers to another class of cases as in conflict with the doctrine of Morice *v.* Bishop of Durham.

"The distinction," he says, "between an illegal trust and a valid, though merely honorary trust, is well brought out by some decisions in the Southern States before the war. A bequest upon trust to emancipate a slave in a slave State was void, it being against public policy to encourage the presence of free negroes in a slaveholding community. But a bequest upon trust to remove a slave into a free State and there emancipate him was not obnoxious to public policy, and although the slave could not compel the trustee to act in his behalf, still the courts acknowledged the right of a willing trustee to give the slave his freedom in a slave State."[2]

But it is to be observed that in most of the slaveholding States the performance of such a trust could be compelled. In North Carolina such a trust was declared to be charitable;[3] and generally the right to sue for freedom was recognized as an exception to the general rule that a slave had no rights; and, either at common law or by virtue of a statute, a slave was allowed to appeal to the courts to enforce a testamentary direction for his emancipation, which was not contrary to public policy.

Thus a slave could offer for probate a will by which he was manumitted, or apply to the court to compel the executor to carry out a direction for emancipation. This appears to have been the law in Maryland, Virginia, South Carolina, Tennessee, and Arkansas.[4]

---

[1] Animals can be provided for by giving legacies to persons conditioned on the life or on the care of the animals. See Fable *v.* Brown, 2 Hill Ch. 378, 397.

[2] 5 HARV. L. REV. 400.

[3] Cameron *v.* Commissioners, 1 Ired. Eq. 436; Thompson *v.* Newlin, 6 Ired. Eq. 380; s. c. 8 Ired. Eq. 32, 43, 44. See also Charles *v.* Hunnicutt, 5 Call 311.

[4] Fenwick *v.* Chapman, 9 Pet. 461; Peters *v.* Van Lear, 4 Gill 249; Patty *v.* Colin, 1 Hen. & M. 519; Redford *v.* Peggy, 6 Rand. 316; Dunn *v.* Amey, 1 Leigh 465; Paup *v.* Mingo, 4 Leigh 163; Nicholas *v.* Burruss, 4 Leigh 289; Anderson *v.* Anderson, 11

In Florida and Texas it is said that an executor would be compelled to carry out such a trust although the mode of exercising the compulsion is not stated.[1] There is nothing to indicate that the law is different in Kentucky.[2] Of the slave states (other than Louisiana, where the common law did not prevail) the state of affairs suggested by Mr. Ames could have arisen at most only in Georgia, Alabama, and Mississippi. And these are the three states to which Mr. Ames specifically refers.

In Mississippi, Buckner, C., in Ross *v.* Duncan,[3] in reference to these cases said: "A trust may be created which may be perfectly consistent with the law, and yet the law may have pointed out no mode of enforcement; still it would not interfere to prevent it, but would leave its execution to the voluntary action of the trustee." But in the Court of Appeal, where the decree of the Chancellor was affirmed,[4] the court referring to the case of Frazier *v.* Frazier in South Carolina say it raises the identical question with that before them, and that the South Carolina court "held the trust to be a valid one which the executors might be *compelled to execute*."[5] And when the same will was again before the Court of Appeals,[6] on a bill against the executors by the American Colonization Society, who had been directed by the will to superintend the removal of the slaves to Africa, the executors were ordered to deliver the slaves to the Society. The court say: "We need not now decide whether any remedy exists on the part of the slaves, if there had been no trustee under the will . . . but we take occasion to say, that in several of the states it has been held that the mere intention of the testator to emancipate, conferred a right to freedom, which, though it cannot be asserted in a court of law, may be enforced in a court of equity;" and they proceed to cite cases to that effect.

In Alabama came up the case of Abercrombie *v.* Abercrombie,[7]

Leigh 616; Phoebe *v.* Boggess, 1 Grat. 129; Reid *v.* Blackstone, 14 Grat. 363; Peter *v.* Hargrave, 5 Grat. 12, 17; Jincey *v.* Winfield, 9 Grat. 708; Susan *v.* Wells, 3 Brev. 11; Frazier *v.* Frazier, 2 Hill Ch. 304; Fisher *v.* Dabbs, 6 Yerg. 119; Hinklin *v.* Hamilton, 3 Humph. 569; Isaac *v.* McGill, 9 Humph. 616; Boon *v.* Lancaster, 1 Sneed 577; Isaac *v.* Farnsworth, 3 Head 275; Stephenson *v.* Harrison, 3 Head 728; Bob *v.* Powers, 19 Ark. 424.

[1] Sibley *v.* Maria, 2 Fla. 553; Purvis *v.* Sherrod, 12 Tex. 140.

[2] On the general question see Cobb, Slavery, c. 16.

[3] 5 Freem. Ch. 587, 603.

[4] Ross *v.* Vertner, 5 How. 305.

[5] The italics are those of the opinion.

[6] Wade *v.* Am. Col. Soc., 7 Sm. & M. 663, 696, 697.

[7] 27 Ala. 489, 495.

where the same question was presented. The Supreme Court said: —

"It may be that the slaves themselves might not be able, by a suit, to enforce the trust; but if it be so, in relation to which we express no opinion, it cannot affect its validity so far as the executor is concerned; and if he was so regardless of duties which he had voluntarily assumed, and of the oath which he had taken to discharge them, as to fail in the faithful execution of the trust, the powers of the Court of Chancery, to which by his will he had submitted the administration, are amply sufficient to enforce it, and the rule which might operate to prevent the beneficiaries themselves from enforcing it by suit would have no application."

But in the later case of Hooper *v.* Hooper,[1] which was not a suit for freedom, the court says that an executor will not "be compelled by the court, *at the instance and suit of the slave*, to carry him to the State to which the will directs him to be carried for the purpose of emancipation. The Court of Chancery will recognize the *authority* of the executor to execute the trust, and, if he *by his bill submits the administration* to that court, it might possess the power to enforce its execution, as a condition of giving its aid and relief to him. But the slave cannot enforce its execution by suit." It is difficult to see how the filing of a bill by the executor can authorize the court to compel him to execute a trust to which he could not be compelled otherwise.

In Georgia[2] there is a like *dictum*. "Should the executor apply to the court for direction, as in the present case, the court will thereby acquire jurisdiction and decree the execution of the trust. And the same result would follow should the next of kin move in the premises." It cannot be said that the slave cases in the Southern States furnish any great authority in favor of the validity of non-enforceable trusts.

A wise course, it is submitted, would have been to follow the judgment of that able judge, Chief Justice Ruffin, and consider all such testamentary provisions as charitable, and to be carried out so far as not forbidden by police enactments.

But perhaps the most satisfactory way of dealing with such provisions is to remember that the institution of domestic slavery was foreign to the common law and had to be incorporated in it as best it could be by notions drawn from the civil law; that emancipation had always been a prominent topic in the civil law; that if manumission was to be allowed, it was almost matter of necessity that

---

[1] 32 Ala. 669, 673.

[2] Cleland *v.* Waters, 19 Ga. 35, 54.

slaves should have a right to petition for their freedom; and that from decisions on the subject of slavery it is dangerous to draw analogies to be applied in other branches of the law.

It may be fairly said that the only considered decision in conflict with the doctrine of Morice *v.* Bishop of Durham is *In re* Dean, where North, J., held that an executor might carry out a trust for animals.

Under the head of gifts to trustees for non-charitable, indefinite objects really also come cases where a gift, devise, or legacy is made to an unincorporated society or club. If the gift is in truth to the present members of the society, described by their society name, so that they have the beneficial use of the property, and can, if they please, alienate it, and put the proceeds in their own pockets, then there is a present gift to individuals which is good.[1] But if the gift is intended for the good not only of the present but of future members, so that the present members are in the position of trustees, and have no right to appropriate the property or its proceeds for their personal benefit, then the gift is invalid.[2] It is intended to be in trust for the society as such, which is a continuing entity in the contemplation of the donor, but which is not recognized by the law as having any standing in the courts.[3]

Those cases where gifts to trustees for non-charitable purposes have been held void suggest a question which at first sight seems rather alarming. Very many clubs or other institutions not charitable have property held by trustees. Are these trusts void, and cannot the trustees expend the income for the benefit of the club?

In answer to this question two suggestions can be made: —

First: The delivery of the property to the trustees is a good mandate, and the trustees can dispose of it in accordance with the

[1] Cocks *v.* Manners, L. R. 12 Eq. 574; Old South Society *v.* Crocker, 119 Mass. 1, 23; Henrion *v.* Bonham, O'Leary on Charities 90. [I have not seen this case. It is cited several times in the Irish Reports, *e. g.* Stewart *v.* Green, Ir. R. 5 Eq. 470, 485; *In re* Delany's Estate, 9 L. R. Ir. 226, 241, 244; Morrow *v.* M'Conville, 11 L. R. Ir. 236, 241.] *In re* Delany's Estate, 9 L. R. Ir. 226; *In re* Wilkinson's Trusts, 19 L. R. Ir. 531. See Anon., 3 Atk. 277; Brown *v.* Dale, 9 Ch. D. 78; *Re* New South Meeting House, 13 Allen 497; Coe *v.* Washington Mills, 149 Mass. 543; Swift *v.* Easton Beneficial Soc., 73 Pa. 362; Burke *v.* Roper, 79 Ala. 138; Stewart *v.* Green, Ir. R. 5 Eq. 470.

[2] Thomson *v.* Shakespear, Johns. 612; s. c. 1 DeG. F. & J. 399; Carne *v.* Long, 2 DeG. F. & J. 75; *Re* Dutton, 4 Ex. D. 54; *In re* Sheraton's Trusts, W. N. (1884) 174; Stewart *v.* Green, Ir. R. 5 Eq. 470; Hogan *v.* Byrne, 13 Ir. C. L. 166; Kehoe *v.* Wilson, 7 L. R. Ir. 10; Morrow *v.* M'Conville, 11 L. R. Ir. 236. See *In re* Clark's Trust, 1 Ch. D. 497; Carbery *v.* Cox, 3 Ir. Ch. 231.

[3] Hogan *v.* Byrne, 13 Ir. C. L. R. 166; Morrow *v.* M'Conville, 11 L. R. Ir. 236, 243.

mandate until the mandate is revoked. See Coe *v.* Washington Mills.[1]

Second: There is in most cases a promise, express or implied, on the part of the trustee to apply the property delivered to him for the benefit of the club, and he can be held on the contract, and the person delivering the property has a remedy for breach of contract.[2] When the money for the club is raised by subscription, there may be a contractual relation, not only between a subscriber and the trustee, but between the subscribers, which would prevent the withdrawal of a subscription.

But it seems that ordinarily a gift by will for a non-charitable club or society (not to be in the disposition for their own benefit of the immediate members) can be avoided by the heirs or next of kin of the testator. In such a case there is no contract.

In some cases in which the validity of a devise has in truth depended on whether it contravened the doctrine of Morice *v.* Bishop of Durham, the courts have said or suggested that it depended on whether a "perpetuity" was created.[3] Particularly is this so in Ireland.[4] And if we take "perpetuity" in its primary sense of "an inalienable interest," the expression is not incorrect. If there is no one who can alienate the beneficial interest, the beneficial interest is inalienable.

But in some of these cases the court speak as if the test of the validity of such devises was their violating or not violating the Rule against Perpetuities, where Perpetuity is used in its secondary sense of Remoteness. This it is submitted is incorrect. The vice in such devises is not that the interests of the *cestuis que trust* are too remote, but that there are no *cestuis que trust* at all.

In several instances the reference to the Rule of Perpetuity is slight. Thus: —

"The property comprised in the devise is therefore to be taken out of

[1] 49 Mass. 543.

[2] Gilman *v.* McArdle, 99 N. Y. 451.

[3] Thomson *v.* Shakespear, Johns. 612; s. c. 1 DeG. F. & J. 399; Carne *v.* Long, 2 DeG. F. & J. 75; Cocks *v.* Manners, L. R. 12 Eq. 574; *Re* Dutton, 4 Ex. D. 54; *In re* Dean, 41 Ch. D. 552; *Re* Jones, 79 L. T. R. 154; Johnson *v.* Holifield, 79 Ala. 423. See Tud., Char. (3d ed.), 57.

[4] Stewart *v.* Green, Ir. R. 5 Eq. 470; Beresford *v.* Jervis, 11 Ir. L. T. R. 128; Kehoe *v.* Wilson, 7 L. R. Ir. 10; *In re* Delany's Estate, 9 L. R. Ir. 226; Morrow *v.* M'Conville, 11 L. R. Ir. 236; Dorrian *v.* Gilmore, 15 L. R. Ir. 69; *In re* Wilkinson's Case, 19 L. R. Ir. 531; Bradshaw *v.* Jackman, 21 L. R. Ir. 12; Reichenbach *v.* Quin, Id. 138; Armstrong *v.* Reeves, 25 L. R. Ir. 325; Small *v.* Torley, 25 L. R. Ir. 388; Brannigan *v.* Murphy, [1896] 1 Ir. R. 418; Webb *v.* Oldfield, [1898] 1 Ir. R. 431.

commerce and to become inalienable, not for a life or lives in being and twenty-one years afterwards, but for so long as ten of the members of the society shall remain. This seems to me a purpose which the law will not sanction as tending to a perpetuity."[1] "It would, I conceive, be an extreme stretch of the rule against perpetuity to hold that it applies to a gift of this sort."[2] "The bequest" to keep up a monument "is invalid as repugnant to the rule against perpetuities . . . a private trust cannot be created so as to operate the inalienability of property beyond the period prescribed by the rule."[3] "The gift there, if not charitable, must have failed, as being contrary to the rule against perpetuities."[4]

The following cases should be noted more particularly: —

Morrow *v.* M'Conville:[5] Here a testator directed the rent of property "to be applied to the use and benefit of the Roman Catholic convent" at L. Chatterton, V. C., held that the gift was not to the members of the convent as individuals, but in trust for a non-charitable community which was incapable of taking it, and that the gift was, therefore, void within the doctrine of Morice *v.* Bishop of Durham; but he also held "that a gift, not charitable, to a religious community, including not only the existing members, but also all persons who should be, or become thereafter, members of it during a period capable of extending beyond the legal limits prescribed by the rule against perpetuities is void." The reason first above given for the invalidity of the gift is, I submit, the correct and sufficient reason.

Bradshaw *v.* Jackman:[6] In this case there was a bequest in trust for the community of a convent. Porter, M. R., said: —

"There are undoubtedly two senses in which the word 'community' may be used. It may mean the aggregate of the persons living in a particular place, or answering a particular description, at a given time. . . . Or it may mean the aggregate of the members of an order or institution from time to time, forever, or so long as it continues to exist. . . . In the latter sense, a gift which in its terms included in its objects persons not in existence, and who might not come into existence until a time beyond the legal limit, would be clearly void for remoteness and uncertainty, unless saved by being charitable. . . . In my opinion, there is nothing to

[1] *Per* Campbell, L. C., Carne *v.* Long, 2 DeG. F. & J. 75, 80, quoted with approval *per* Kelly, C. B., in *Re* Dutton, 4 Ex. D. 54, 58.

[2] *Per* Wickens, V. C., Cocks *v.* Manners, L. R. 12 Eq. 574, 586, quoted with approval *per* Chatterton, V. C., *In re* Wilkinson's Trust, 19 L. R. Ir. 531, 536.

[3] *Per* Clopton, J., Johnson *v.* Holifield, 79 Ala. 423, 424; *cf.* Matter of Fisher, 2 Connoly, 75, under the New York Statute.

[4] *In re* Delany's Estate, 9 L. R. Ir. 226, 233.

[5] 11 L. R. Ir. 236.

[6] 21 L. R. Ir. 12.

drive me to the meaning which would make the bequest err against the rule as to perpetuities." [1]

The Master of the Rolls held, that is, that the bequest was for the benefit of a class consisting of certain specific living persons, and was therefore good; but that if the bequest had been for the benefit of a class which might comprise within its numbers persons not coming into existence till a remote time, it would have been bad, a proposition which is true enough; but the real distinction in the intention of the testator is not between a gift to a class consisting of certain individuals, and a gift to a class consisting of other individuals, but between a gift to individuals and a gift to a society as a continuing entity, abstracted from any individuals, which last is not recognized by the law as having any standing in courts, being neither a corporation nor a charity.

Armstrong *v.* Reeves: [2] In this case a testator gave a legacy "to the Society for the Abolition of Vivisection, payable upon the receipt of the Treasurer for the time being;" and he gave the residue of his estate "to the Society of Carlsruhe for the Protection of Animals, to be paid to the Treasurer for the time being of the said society." Chatterton, V. C., held that the gifts were charitable; and also that even if they were not charitable they were valid, because there was no indication of "an intention that the gifts received by the society shall be applied in a manner exceeding the limits which the law prescribes with regard to perpetuity." The reason first above given was a valid and sufficient ground for sustaining the trust.

Small *v.* Torley: [3] A testator gave to A., "the present Roman Catholic clergyman officiating as superior" of a certain church, "or the clergyman filling that office at the time of my decease, and to his successors from time to time so officiating," an annual sum of £10 for fifty years, "in trust that he or his said successors during said period" shall have mass celebrated in said church for the repose of the souls of the testator and of his wife and parents. This gift was held to be bad as a perpetuity; and so it was, using "perpetuity" in its primary sense of "inalienable interest;" [4] but the court (Porter, M. R.,) considered and rejected the theory that this legacy could be sustained for the life of the present incumbent, thus apparently assuming that if the legacy had been confined to his life it would have been good. Speaking of the case

[1] 21 L. R. Ir. 17, 18.
[2] 25 L. R. Ir. 325.
[3] 25 L. R. Ir. 388.
[4] See p. 519, *ante*.

of Dillon *v.* Reilly,[1] the Master of the Rolls says: "It cannot be treated as a decision that in a case where words are used which purport to tie up property beyond legal limits the court will from thence carve out a life estate, hold it good to that extent, and reject the rest."

There remain only two cases to notice. The first of these cases is Hornberger *v.* Hornberger.[2] A testator gave all his estate, after the death of his wife, to a city for the benefit of its poor; "subject to the following exception, to wit: the flower garden and graveyard where my child Jettie is buried, and where I expect myself and wife to be buried . . . is not to be sold under any circumstances, but the same is vested in my wife for and during her natural life, and at her death" the city "are to act as trustees, and are to hold said graveyard and flower garden in trust, and out of my estate to keep the same up." The court held that there was a good devise for charity; they say that if the testator carved "out of the charity fund a fund for a perpetuity which must fail, we are not at liberty because of the dependent and illegal devise to avoid the whole will; but, rejecting the part that is repugnant to law and public policy, we must allow the part which is lawful to be the will of the testator; that which is primary and valid must stand; that which is not primary and valid must fail." All that is said about the wife's life estate is in this sentence at the end of the opinion: "The trust to the wife of keeping up the graveyard and flower garden during her life is lawful." The nature of the proceeding, beyond the fact that it was a bill in equity, does not appear. It was not a bill for instructions, for the executrix (presumably the wife) was not the complainant. According to the reasoning of the court with reference to the city, if the trust to keep up the grave were bad, the wife would take the estate free from the trust; and it does not appear, nor is it likely, that she neglected to keep up the garden and graveyard, and that this was a suit to compel her to do so. The sentence last above quoted must therefore have been only a *dictum*. It is to be observed that no question of the Rule against Perpetuities arose in the case; it was a question not of a future but of a present interest; and the *dictum* was that one may hold property for life on an indefinite non-charitable trust; and this, it is submitted, was incorrect.

In re Dean,[3] commented on above. Here there was a gift in trust for the support of certain animals. North, J., speaking of a gift for the repair of a monument, said: —

[1] Ir. R. 10 Eq. 152. [2] 12 Heisk. 635. [3] 41 Ch. D. 552, 557.

"I know of nothing to prevent a gift of a sum of money to trustees upon trust to apply it for the repair of such a monument. In my opinion, such a trust would be good, although the testator must be careful to limit the time for which it is to last, because, as it is not a charitable trust, unless it is to come to an end within the limits fixed by the rule against perpetuities, it would be illegal. But a trust to lay out a certain sum in building a monument, and the gift of another sum in trust to apply the same in keeping that monument in repair, say, for ten years, is, in my opinion, a perfectly good trust."

On this case it is to be remarked (1) that it was not carried to the Court of Appeal; (2) that the decision was based largely on the case of Mitford *v.* Reynolds,[1] by which the judge felt himself bound, and in which the question does not appear to have been discussed; (3) that the judge did not refer to Morice *v.* Bishop of Durham; (4) that a trust for the perpetual repair of a monument is not obnoxious to the Rule against Perpetuities, for that rule relates to the creation of future interests, and has nothing to do with present interests, and that, if a trust for the repair of a monument is illegal, it is because there is no *cestui que trust* with an alienable interest, not because the trust is to begin on a remote contingency; (5) that even if a trust which can last longer than twenty-one years after lives in being were bad, then this trust for horses and dogs would be bad, because it might last conceivably for more than twenty-one years after the extinction of all *human* lives. The idea that the validity of a limitation over (or of a trust) may depend upon whether the limitation must happen (or the trust determine) within the lifetime of an animal is a notion as novel as it is ridiculous. Can a gift over be made to take effect upon the death of any animal however longevous, — an elephant, a crow, a carp, a crocodile, or a toad?

To sum up. I submit that the doctrine of Morice *v.* Bishop of Durham is good law, and is of general application.

There are only two exceptions, — funeral expenses and charities: the first is matter of necessity, the second is an exception in form only and not in substance.

John Chipman Gray.

[1] 16 Sim. 105.